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Supreme Court of the United States

OCTOBER TERM 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

—v.—

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE AND OPERATION RESCUE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL NETWORK OF ABORTION FUNDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993
No. 92-780

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

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JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE AND OPERATION RESCUE,

Respondents.

On Appeal from the United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE NATIONAL NETWORK OF ABORTION FUNDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted in support of petitioners National Organization for Women, Inc., et al. By letters filed with the Clerk of the Court, petitioners and respondents have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

The National Network of Abortion Funds (NNAF) is a coalition of 23 non-profit community-based groups that provide financial assistance to low-income women denied access to abortion by federal and state Medicaid funding bans. As a national network organized to ensure low-income women's access to reproductive health care, *amici curiae* have a particular interest in halting the concerted violence, harassment and intimidation being directed against women seeking abortions and against physicians and clinics providing abortion services.

Low-income women rely heavily on clinics and clinic personnel -- the most likely targets of anti-choice zealots -- for reproductive health care, as very few of these women have access to private physicians and clinics provide services at lower cost. In addition, because low-income women already face numerous obstacles to obtaining health care, they are impacted more severely by respondents' campaign of violence and intimidation than are other women. *Amici curiae* have experienced first hand the hardships that result from a lack of federal support for women's access to abortion, and thus are acutely concerned that the federal protection against clinic violence provided by the Racketeer Influenced and Corrupt Organizations Act ("RICO") not be eviscerated.

SUMMARY OF ARGUMENT

The Court of Appeals for the Seventh Circuit incorrectly construed the scope and applicability of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). As

explained in Points I and II, respondents are engaged in a nationwide campaign of violence, harassment, and threats against doctors and clinics who provide abortions, and women who seek them. In direct response to this organized effort, increasingly few doctors are willing to perform abortions and many women are reluctant to go to clinics to obtain even medically necessary abortions, thus jeopardizing women's health and thwarting the right to choose abortion. It is essential that respondents' violent and unlawful activities directed against women, doctors and clinics be stopped. As explained in Points III through V, RICO provides the necessary federal legislative response to the violence and harassment.[1] Thus, in accordance with RICO's mandate that it be construed liberally, and in order to put an end to this national crisis of lawlessness and violence, this Court must reverse the decision of the Court of Appeals.

ARGUMENT

I. VIOLENCE, HARASSMENT AND INTIMIDATION DIRECTED AT WOMEN SEEKING ABORTIONS, PHYSICIANS, AND CLINICS ARE PERVASIVE.

Since *Roe v. Wade*, 410 U.S. 113 (1973), the landmark decision finding constitutional protection for the right to choose abortion, anti-choice zealots have sought to make abortion a crime, or, at the very least, unavailable. While some anti-choice organizations and individuals have adopted lawful methods, such as legislative initiatives and nonviolent protest, a large and continually increasing number rely on extreme acts that range from large and sometimes violent blockades and clinic invasions to serious criminal activity. In

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[1]Moreover, even under the most liberal construction of RICO, the argument that RICO could be used against protected speech is specious, as the statute reaches only criminal conduct, and any RICO violation is predicated on already criminalized activity.

all of its forms, anti-choice activity has become pervasive. Moreover, mere protest is not at issue here, but rather "reprehensible," *National Organization for Women v. Scheidler*, 968 F.2d 612, 621, 630 (7th Cir. 1992), organized, criminal, activity,[2] activity that, if left unchecked, will eviscerate the right to choose abortion as surely as a criminal ban. RICO defines "racketeering activity" as "(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs . . ." 18 U.S.C. § 1961(1)(1988) (emphasis added). As shown below and as detailed in petitioners' complaint, the activities of anti-choice extremists, such as respondents, plainly constitute a "pattern of racketeering activity" within the meaning of RICO.

A. Threats and Violent Actions Against Abortion Clinics Are Severe.

Violence at clinics throughout the United States is a matter of grave importance. Testimony presented to Congress at hearings held by the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary in 1985 and 1986 (the "1985-86 Hearings"), some of which is excerpted below, illustrates the criminal nature of respondents' activities and the siege-like atmosphere in which clinics have been forced to provide health care to women.

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[2]As the Seventh Circuit recognized:

> the complaint does not attempt to bar all anti-abortion activities. Peaceful picketing, debate, meetings, prayers, and a host of other forms of peaceful protest, are protected by the First Amendment. The complaint seeks relief from criminal and tortious activities such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships.

968 F.2d at 616.

For example, Heather Green, Director of Community Education at the Hillcrest Clinics in Norfolk, Virginia testified:

> Since we are the only facility in our area which provides abortion services, we have become the target for antiabortion violence and harassment.
>
> On May 26, 1983, an arsonist broke into our clinic and set fire to our facilities. The damages were approximately $150,000 and the clinic was closed for 20 days. Twenty customers of the Navy Federal Credit Union, which is another tenant in the building, were unable to close on their home mortgages that day, and Sovran Bank, which is below the clinic, suffered severe water damage.
>
> . . .
>
> After filing [a civil suit to enjoin the trespassing, etc.], we had an increased number of telephone harassments, hate mail, and bomb threats. On February 17, 1984, a bomb exploded outside of our building. . . . 1 of 7 pipe bombs exploded, and damage resulted to the bank downstairs . . .
>
> Our employees suffered nightmares as a result of these activities. Our administrator was forced to flee her home for a weekend because the local authorities did not feel her home was a safe place to be. We have a 24-hour security guard which costs $4,000 a month. And we have had women who would refuse to come to our clinic because of the picketing and the bombings which have occurred. They are afraid to come to the clinic and travel a distance of 40 miles to the next clinic.

1985-86 Hearings at 7-8. The arson described by Ms. Green is plainly a predicate act under RICO. In addition, the arson, the bombing and the bomb threats constitute the RICO predicate act of "extortion" in that they are an attempt to close and/or take business away from the clinics through the "wrongful use of actual or threatened force, violence, or fear," in violation of

the Hobbs Act, 18 U.S.C. § 1951(1).[3]

Ms. Beverly Whipple, Executive Director of the Feminist Women's Health Center of Yakima, Washington testified:

> Most of the experiences that I am going to describe took place during an 8-month period between August of 1983, the time that the Everett clinic opened, and April of 1984, when the clinic was forced to close after the third fire. Two of those months the clinic was closed for repairs after the first fire.
>
> . . .
>
> At one point there was an actual, physical confrontation and assault with a picket sign. In one instance the pickets interferred [sic] with an ambulance transport to a hospital. The picketers created a situation that made it more difficult for the ambulance attendants to transport the patient. In addition, the picketers were taking pictures of the patient while she was being transported. When the attendants asked them not to do it, they continued to do so.
>
> . . .
>
> This went on daily for 2 months. . . . [A]t least one letter threatened our person and advised us to carry guns. It mentioned that car bombs may be next. In a 2-week period in Yakima there were two attempted break-ins. In a 4-week period in Yakima there were four staff cars vandalized.
>
> . . .
>
> Over a 2-day period, 132 calls were traced to one residence. During an injunction hearing . . ., the man to whom the phone was listed denied making the calls.

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[3]The Third Circuit Court of Appeals correctly held that the Hobbs Act does not require that extortion have an economic motivation. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989).

> A bomb threat was received. The caller said the clinic would be blown to bits in 3 minutes.
>
> After the first fire, December 3[, 1983], we hired off-duty police officers for building security. Two days later we were informed that our use of off-duty police would be discontinued due to the abortion situation and there was a need for them to remain neutral in this case and not to take sides. After three fires, however, when we no longer had a clinic, the mayor had changed his position on this issue.

1985-86 Hearings at 23-24. The three incidents of arson and the bomb threats described by Ms. Whipple constitute "racketeering activity" within the meaning of RICO, 18 U.S.C. § 1961(1).

Mary Bannecker, Administrator of the Northeast Women's Center in Philadelphia, Pennsylvania, testified:

> I have personally observed women's arms being grabbed when they have refused to acknowledge the picketers or pleaded with them to be left alone. Their arms are grabbed as these picketers are screaming within inches of their face, ...
>
> . . .
>
> [O]n December 8, [1983], 31 people trampled into the clinic, literally treading on me as they ran up the steps to the third floor . . . [T]hey shoved the office manager so that about 11 of them could get to the rear of the clinic.
>
> One of the men that had entered the building . . . repeatedly hit the lab technician with the door, because she was preventing him from entering the lab because a 15-year old teen was in the lab. She sustained bruises and cuts, and a strained back. She was unable to return to work for 2 weeks and did return against medical advice. The 31 people that came into the clinic had to literally be carried out of the building by the police.

> During the following week we received three bomb threats. One of the bomb threats, we evacuated the building, and one of the people who was evacuated was a woman who had just had an abortion completed under general anesthesia and had to be carried out on a gurney, and literally awoke in the parking lot of the building.
>
> . . .
>
> It is already a highly stressful job because they're working with women in crises, and now they have the threat of violence hanging over their head. This fear and anguish is compounded by the women who are seeking our services. These women who choose to terminate their pregnancies do not do so either carelessly or casually. Screams and physical assaults only add to their distress and emotional turmoil. They enter the clinic visibly shaken and upset. What is so frightening is that the antiabortionists are neither passive nor nonviolent.

1985-86 Hearings at 5-7. The bomb threats and the threats and attacks of physical violence to people and property for the purpose of scaring away the clinic's patients and/or shutting down the clinic, as described by Ms. Bannecker, are predicate acts of racketeering activity under RICO.

In recent months, opponents of legal abortion have become even more violent and threatening. On March 10, 1993, Dr. David Gunn, a Florida abortion provider who had been subjected to repeated harassment, was shot three times in the back and killed as he was entering a Pensacola, Florida clinic.[4] This murder, by itself a tragedy, is symptomatic of the escalating pattern of violence.[5] In response to the increasingly widespread and organized violence against abortion clinics and providers, Congress held two sets of

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[4]Dr. Gunn's murderer frequently harassed patients outside of clinics.

[5]Murder, too, is a predicate act under RICO. 18 U.S.C. § 1961(1)(A).

hearings regarding federal remedies to stop clinic violence and to protect women's access to abortion services. *See* Senate Comm. on Labor and Human Resources (hearing on S. 636, the Freedom of Access to Clinic Entrances Act of 1993) (May 12, 1993) (the "1993 Senate Hearings");[6] House Judiciary Comm., Subcommittee on Crime and Criminal Justice (the "1993 House Hearings"). The following excerpts of testimony given at those hearings provides a view of the worsening conditions under which women's health care clinics are attempting to provide services.

Willa Craig, Executive Director of the Blue Mountain Clinic in Missoula, Montana, testified that on March 29, 1993, the clinic was burned to the ground in an arson attack.[7] Because of the lack of medical office space in Western Montana, since the fire, the clinic's internist is able to see only about 40% of her usual number of patients; no new patients are being accepted, particularly no new prenatal patients, and pediatric care is completely on hold. 1993 Senate Hearings, Craig Testimony at 2. According to Craig:

> [t]his act of devastating violence was the culmination of several years of escalating crimes against the clinic and its staff as providers of abortion. . . . In the past four years, . . . things have changed dramatically. The number of protestors has increased and the character of the

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[6]The proposed legislation, the Freedom of Access to Clinic Entrances Act (FACE), currently moving through Congress, is designed to combat the recent increase in violence against abortion providers. FACE, however, is a supplemental remedy and does not relieve the courts of their duty to enforce existing law.

[7]At the Blue Mountain Clinic, abortion services comprise less than 20% of the total patient visits per month. 1993 Senate Hearings, Craig Testimony at 2. The arson attack bore similarities to a 1992 arson that extensively damaged a Planned Parenthood clinic in Helena, Montana. Id.

> demonstrations has consistently required police involvement. Picketers who once appeared satisfied to walk back and forth in front of our office with signs were joined by individuals who on a weekly basis blocked driveways, screamed at staff, and interfered with patients attempting to enter our facility.
>
> Beginning in November of 1989, protests at the clinic became routine and a group of leaders emerged, calling themselves "Rescue Montana." This group advertised publicly its intentions to recruit anti-choice protesters who would willingly and knowingly break the law. They arrange training of new recruits in Montana by nationally known offenders and themselves travel out of state to participate in "rescues" such as the massive demonstration in Wichita.
>
> In November of 1991, "Rescue Montana" announced publicly that it would blockade a clinic that week. . . . The demonstration and blockade that took place that week involved approximately 80 protestors, 31 of which were eventually arrested. Few were from our community.
>
> During the protest the clinic was very nearly invaded by a group of large men and a staff person received minor injuries in the scuffle to prevent the invasion. Ending the blockade required the fire department, including the "jaws of life," six units of the city police, and the county sheriffs department. The resulting trial in municipal court lasted more than five days and cost the city thousands of dollars. In the time period between these convictions and the arson that destroyed our clinic, many of those convicted returned, and participated in further disturbances.

Id. at 2-4. Arson and threats and commission of physical violence for the purpose of putting the clinic out of business, as described by Ms. Craig, constitute predicate acts under RICO.

John E. Cowles, an attorney in Wichita,[8] Kansas testified regarding the clinic blockades and other tactics used by respondent Operation Rescue and other groups in Wichita in the summer of 1991. Cowles reported that when the clinics obtained and served a temporary restraining order on respondent Randall Terry:

> [Terry] threw it to the ground . . . [and] told his followers that injunctions were to be used as toilet paper and that the marshals could send the injunctions to hell along with the judge that had signed it. He called the federal judge a 'nazi,' and Operation Rescue leaders later distributed both the office and home telephone numbers of Chief Judge Patrick Kelly, who had signed the order.
>
> Judge Kelly called a meeting in his chambers where he implored the mayor and city manager to authorize city police to protect access to the clinics by enforcing municipal trespass ordinances. They refused. Meanwhile, the blockades prevented access to the clinic for an entire week, and the leaders announced they had decided to stay the entire summer. The Governor of Kansas accepted an invitation to attend an Operation Rescue rally, where she encouraged their efforts. The telephone campaign against Judge Kelly became more ominous when death threats were received. Two federal marshals were assigned to put Judge Kelly under constant protection and new security devices were added to his chambers.

1993 House Hearings, Cowles Testimony at 2-3. The threats of physical violence against Judge Kelly are clearly predicate acts under RICO.

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[8]John E. Cowles is an attorney with McDonald, Tinker, Skaer, Quinn and Herrington, P.A. in Wichita, Kansas. He filed an action and received a temporary restraining order against anti-choice protesters at Women's Health Care Services in Wichita.

This violent conspiracy aimed at shutting down clinics through arson, blockades, intimidation, and other criminal means, has a devastating effect on access for low-income women. Rural low-income women, low-income women with children who must arrange for childcare, and the working poor with little or no flexibility at their places of employment are particularly burdened by being forced to make additional trips to clinics that are forced to shut down temporarily due to blockades, arson or other violence.

B. Physicians Who Provide Abortion Services Also Are Subject to Threats and Violence.

In addition, anti-choice militants are engaged in an organized campaign to threaten, stalk and assault physicians.[9] Frank Snydle, M.D., an obstetrician-gynecologist who performs abortions in Florida has been followed home repeatedly, had his car windows smashed, and "wanted" posters featuring a $1,000 reward for information leading to revocation of his medical license have been widely circulated in central Florida. Abortion Foes, *supra.* The posters also include the address and phone number of his 80-year old mother. Shortly after the campaign against Dr. Snydle began, his mother received a telephone call at 3:00 a.m. from someone identifying himself as a highway patrol trooper, who told her that her son had been killed in a car accident. *Id.*

Testimony presented to Congress this year made palpable the pervasiveness of respondents' campaign against physicians and the fear that their terrorist techniques have engendered. Susan Hill, President of the National Women's Health

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[9]For example, Operation Rescue leader respondent Randall Terry actively encourages harassment of medical staff. Terry has stated that "the doctor is the weak link," and has incited his followers to "do everything we can to torment these people." Abortion Foes Strike at Doctors' Home Lives, *Washington Post*, April 8, 1993, A1 at A17.

Organization, testified regarding the murder of Dr. Gunn:

> Dr. David Gunn had worked with our Columbus, Georgia clinic since 1985. I received a phone call on March 10, 1993, with a simple frightening message, "They shot Dr. Gunn. He is dead." In reflecting on this moment, I realize that the shocking thing about the message was not the incident; it was that for a moment I thought it was about two other physicians who had been living under death threats for months. We had believed that Dr. Gunn was in less danger than five of our staff physicians.

1993 House Hearings, Hill Testimony at 1.

Several physicians who perform abortion procedures also testified. Pablo Rodriguez, M.D.,[10] asking the Senate "to walk just a few yards in my shoes and feel what thousands of health care providers across the country feel every day of their lives," 1993 Senate Hearings, Rodriguez Testimony at 2, described the following occurrences:

> In the beginning, the harassment was the usual nasty letter and graphic pictures of dismembered fetuses; but slowly it became more aggressive. I began receiving strange packages with dolls inside, as well as subscriptions to gun magazines and hunting lodges, showing pictures of dead animals hanging by their extremities. Then the "Wanted Posters" began to appear . . . Copies of this hideous poster were also sent to my wife at home and to my office. Then the doors and locks to our clinic were glued on multiple occasions culminating with three

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[10]Dr. Rodriguez is a clinical assistant professor of Obstetrics and Gynecology at Brown University Medical School, a fellow of the American College of Obstetricians and Gynecologists, and the Medical Director of Planned Parenthood of Rhode Island.

episodes of forceful blockading of our clinic. . . . The day Dr. Gunn was shot, I knew that my life would irrevocably change.

One week after his death, as I was driving my mother to the bus station, I realized that my car was steering poorly. Once I dropped her off, I examined my tires and found that there were 45 nails deeply embedded in them; a fortunate finding considering that I was driving over 50 miles an hour on the highway. That evening, when I returned home, still unaware of the location of this act of vandalism, my wife painfully discovered with her foot that my driveway was "booby-trapped" with roofing nails cleverly buried under the snow. An image of my young children running and skinning their knees on that same section of driveway has filled my heart with a fear that, until this day, I have not been able to shake off.

The response from the police in my community was that they could not help and in view of the events in Florida, they recommended a bullet-proof vest.

The following week I received a bill for an insurance policy on my wife's life [which we had not applied for.]

Id. at 3-4.[11]

Norman T. To[illegible]ins, M.D., an obstetrician-gynecologist in private practice in Dallas, Texas, testified before the House Committee and submitted documents that had been filed on his behalf in a Texas lawsuit seeking a temporary injunction against the anti-choice zealots who have targeted him.[12] The

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[11]The shocking acts taken to coerce Dr. Rodriguez to stop performing abortion procedures, an integral part of his medical practice, fall squarely within the Hobbs Act.

[12]Three physicians in Dallas stopped performing abortions since April 1992 after they were pressured by an antiabortion group. Abortion Foes at A-17.

legal documents submitted by Dr. Tompkins show that:

• individuals associated with the Dallas Pro-Life Action Network ("Dallas PLAN")[13] threatened Dr. Tompkins with destroying his private practice if he didn't agree to stop performing abortions;[14]

• the President and owner of Dallas PLAN sent a letter to Dr. Tompkins on Dallas PLAN stationary following up on the demand;

• after Dr. Tompkins refused to give in to this ultimatum, he and his wife began to receive graphic postcards at their home and places of employment, with messages such as "Obviously you don't know what a real 'terrorist' is. Perhaps someday soon you will. Think not that I am come to send peace on earth: I came not to send peace, but a sword.";

• the individuals associated with Dallas PLAN have followed the Tompkins' car on several occasions, kept their homes under near-constant surveillance, shouted at them as they left their driveway, confronted them inside their church, filled their mailbox with threatening and harassing mail, made five to 15 harassing telephone calls per day at all hours of the day and night, and inundated

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[13]Dallas PLAN is affiliated with Rescue America. A Tale of 2 Dallas Abortion Doctors: One Surrendered, One Is Fighting On, *Washington Post*, April 8, 1993 at A-16.

[14]Another Dallas obstetrician, Dr. Clay Alexander, gave in to Dallas PLAN's demands, signing a letter saying he would never perform another abortion, and providing Dallas PLAN with a passport-quality photograph of himself for the organization's files. A Tale of 2 Dallas Abortion Doctors: One Surrendered, One Is Fighting On, *Washington Post*, April 8, 1993 at A16.

their answering machines with messages designed to provoke their anger and fear;[15]

In addition, at the 1985-86 Hearings, Philip Stubblefield, M.D.[16] testified:

> My colleague, Dr. Peter Bours, who has a practice in Forest Grove, Oregon, at one point felt it necessary to move his family to an undisclosed location, as a result of daily confrontations and threats at his facility. Clinic administrators in an Oklahoma city call the NAF office for advice, afraid they are about to lose their doctors discouraged by daily home picketing or threats to the hospital where they have admitting privileges. My friend and esteemed colleague, Dr. Baird Bardarson of Renton, Washington was slapped with criminal assault charges after he confronted a trespassing, long-time picketer outside his office. Although months later a jury threw out the assault charges after only 30 minutes of deliberation, the anxiety and pain experienced by the physician during those months was immeasurable. Imagine, also, the emotion experienced by a doctor in a small East-Coast city, who returned to his clinic one morning after delivering a baby, only to find that someone had (falsely) left a message on his answering machine that one of his children was lying dead in the coroner's office.

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[15]Because of the death threats Dr. Tompkins has received, he wears a bullet-proof vest and has hired bodyguards. A Tale of 2 Dallas Abortion Doctors: One Surrendered, One Is Fighting On, *Washington Post*, April 8, 1993 at A16.

[16]Dr. Stubblefield is Chief of Obstetrics and Gynecology at Mount Auburn Hospital in Cambridge, Massachusetts, Associate Professor of Obstetrics and Gynecology at the Harvard Medical School, and a past president of the Planned Parenthood League of Massachusetts and a past president of the Board of the National Abortion Federation ("NAF").

1985-86 Hearings at 251-52.

The shortage of physicians willing to provide abortions leads to an increase in cost and a dearth of services, making reproductive health care unavailable to increasing numbers of women who then turn to *amici curiae*, NNAF, abortion funds for financial assistance. Moreover, as a matter of law, policy and fundamental fairness, medical professionals should not have to put up with violence, extortion, death threats, or threats against their children and spouses as the price for providing health care to women.

C. Protests and Violence Have Increased Since *Planned Parenthood v. Casey* and *Bray v. Alexandria Women's Health Clinic*

The increasingly desperate acts of anti-choice groups are in part a reaction to this Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), that makes clear that states may not ban abortion. Having failed to see *Roe v. Wade* overturned or the Human Life Amendment passed, the anti-choice forces have shifted their focus toward preventing abortion by denying women access to abortion services and driving physicians out of the profession by extortion and threats of violence.[17] Anti-choice activities at clinics has also increased since this Court's ruling in *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993), which some

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[17]Respondent Scheidler has stated:

> We haven't been successful in getting the Human Life Amendment passed or in getting *Roe* overturned. When you get doctors out, you can have all the laws on the books you want and it doesn't mean a thing.

Abortion Foes Strike at Doctors' Home Lives, *Washington Post*, April 8, 1993, A1 at A17.

anti-choice extremists have apparently interpreted as a message that their methods are not actionable under federal law.

For example, John E. Cowles, Esq. testified before Congress that:

> [*since* the clinic blockades in Wichita in the summer of 1991] the most intense harassment efforts by protestors have been directed against physicians . . . In addition to telephoned death threats and bomb threats to the clinics, protestors have invaded two of the three Wichita clinics, spray painted buildings, thrown stink bombs at ventilation units, glued locks, chained gates, turned off utilities, knocked down fences, and pitched thousands of tiny nails or tacks into the driveways and parking lots of the clinics. When a physician leaves, he or she is often followed and protestors swerve their automobiles or stop suddenly trying to create an accident or force the physician off the road. One physician wears a bullet-proof vest and has purchased a trained guard dog to accompany him around the clock. For several days, protestors camped out across the street from one physician's residence, shooting off fireworks through the night, shining lights at the residence and using a bullhorn to broadcast obscenities. Protestors followed physicians to church and disrupted services on two occasions. Protestors stalked physicians in the residency program at Wesley Hospital in Wichita, and followed them to their homes, ...

1993 House Hearings, Cowles Testimony at 3-4.[18]

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[18]Statistics compiled by the National Abortion Federation (NAF) confirm the recent dramatic increase in reported incidents of harassment and violence against abortion providers and women seeking abortion. For example, between 1991 and 1992, reports of attempted bombing and arson incidents at clinics increased from one to 9; reports of vandalism

(continued...)

In sum, despite the fact that the right to choose abortion has been constitutionally protected for twenty years, testimony before Congress shows that criminal violence and threats against clinics and physicians who perform abortions are widespread and have worsened as an organized network of abortion opponents strives, virtually unchecked, to eliminate abortion as a choice for women. Moreover, the testimony shows that much of the criminal anti-choice activity constitutes predicate acts of racketeering activity under RICO.

II. THE RESPONDENTS' ORGANIZED CAMPAIGN OF VIOLENCE AND INTIMIDATION SERIOUSLY JEOPARDIZES WOMEN'S ACCESS TO ABORTION.

The respondents' concerted efforts to extort physicians from providing abortion services has been effective: this country faces a dire shortage of physicians who provide abortions, resulting in increased cost, severe impacts on women's health and curtailment of their ability to choose abortion.

A. As A Direct Result of Violence and Threats, the

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[18](...continued)
increased from 44 to 115; reports of clinic blockades increased from 41 to 81; reports of arson incidents at abortion clinics rose from 10 to 13. National Abortion Federation, Incidents of Violence and Disruption Against Abortion Providers, 1992. In the first five months of 1993 there has already been a shocking increase in violent attacks on clinics and abortion providers. In addition to the murder of Dr. Gunn, six clinics have reported invasions by antiabortion militants who stormed the clinics, destroyed equipment and in some instances physically assaulted clinic staff. National Abortion Federation, Summary of Extreme Violence Against Abortion Providers as of June 1, 1993: Other Reported Incidents of Serious Violence, 1993. Twelve clinics reported chemical attacks, one in which a patient and a clinic staff member required medical treatment and five clinics have reported arson. *Id.*

Number of Abortion Providers Has Decreased Substantially In the Past Several Years.

During the last two decades, there has been a steady decline in the number of facilities and clinicians willing to provide abortion services. The decline in the number of abortion providers is directly attributable to organized efforts by extremist anti-choice organizations and individuals.[19] Since Dr. Gunn's slaying, at least eight physicians have stopped performing abortions.[20] As early as 1985, Dr. Stubblefield testified before Congress that:

> [He had] seen what aggression directed against other physicians has done to the facilities with which I have been affiliated. The Planned Parenthood League of Massachusetts, at its Worcester, Massachusetts facility, lost two very able Medical Directors as a result of harassment. One Director, a fine young physician who also had a private practice in Boston, felt compelled to resign after picketers came to his private practice every day, passing out literature containing his home address and telephone number. The threatening phone calls to his home were frightening to him, his wife and young children. The second physician, a very active and competent director, felt compelled to resign after he too received threats that his private office would be bombed, and after his children received written threats while they were at school. In the course of dealing with this crisis, I

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[19]In addition, as a direct result of the organized harassment, clinics are finding it nearly impossible to fill physician positions. See Abortion Clinics Seek Doctors But Find Few, *New York Times*, March 31, 1993 at A-14; The Dearth of Abortion Doctors, *Washington Post* (Health), April 20, 1992 at 7.

[20]Doctors Say Abortion Foes Intimidating, *USA Today*, April 13, 1993 at 2A.

> served twice as acting Medical Director for the Worcester clinic. . . . I too . . . received written threats, . . .

1985-86 Hearings at 250-51.

Today, abortion services are available in only 17 percent of the counties in the United States.[21] Stanley K. Henshaw & Jennifer Van Vort, Abortion Services in the United States, 1987 and 1988, 22 *Fam. Plan. Persp.* 102, 106 (1990). Only 7 percent of the counties in rural areas have an abortion provider. *Id.* at 106. Thirty-one percent of women of childbearing age live in a county in which no abortion services are available. *Id.* at 106. The lack of services has the greatest impact on low-income, rural, or young women. Women without the resources to travel to a provider -- or to pay for the procedure -- are more likely to obtain an abortion later in their pregnancies, when health risks are significantly greater and costs for the procedure are substantially higher, or to be forced to carry an unwanted pregnancy to term.

B. The Shortage of Providers and the Fear of Violence and Harassment at Clinics Pose a Significant Threat to Low-Income Women's Health.

As stated above, it is beyond debate that low-income women have far less access to the health care system than middle and high-income women. These women already face delays in obtaining critical health care because of an overloaded and inadequate Medicaid system. This problem is particularly acute as to abortion because Medicaid does not

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[21]In addition, fewer and fewer doctors are willing to provide later abortions, which are most often required in cases where the woman is young or low-income, or the fetus is anomalous. Carolyn Westhoff, M.D., Residency Training in Contraception, Sterilization and Abortion, *Obstetrics & Gynecology*, Vol. 81 No. 2, Feb. 1993.

provide reimbursement for this service in the overwhelming majority of states.

Thus, the violence, intimidation, coercion, extortion, and other criminal activities engaged in by respondents has a particularly severe effect on this community of women. It causes additional delay, reduced services, and outright physical and psychological obstacles under circumstances where low-income women already obtain a disproportionate number of riskier second trimester as opposed to first trimester abortions. Henshaw & Wallisch, The Medicaid Cutoff and Abortion Services for the Poor, 16 Fam. Plan. Persp. 170, 178 (1984). Moreover, the poverty and violence in these women's lives also subject them to high levels of stress, which is exacerbated by the respondents militant tactics. As Dr. Rodriguez testified in Senate hearings this year as
to the health effects on women:

> Our patients are the ones who suffer. Women who do make it in have a heightened level of anxiety and a greater risk of complications. The delay caused by the invasions has forced some patients to seek care elsewhere due to the fact that their gestational age has gone beyond the first trimester. The risk to these women is unnecessarily increased. These assaults also interfere with the entire range of reproductive health services that we deliver, including contraception, general gynecology and treatment for STDs.

1993 Senate Hearings, Rodriguez Testimony at 6.

Similarly, in *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992), in which plaintiffs sought to enjoin "blockades" of clinics and so-called "rescues" of patients, the court noted:

uncontradicted testimony that the risks associated with an abortion increase if the patient suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain health care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.

Often times, patients are too upset to undergo the medical procedures scheduled for that day and must reschedule the procedure . . . This delay can increase the risks associated with an abortion. For example, the delay may move the pregnancy from the first trimester to the second trimester during which the risks associated with the procedure increase. Other women who are seeking a post-abortion check-up might delay their appointment or simply cancel it altogether, thereby enhancing the possibility of complications. For some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a device known as a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a woman returning to have the laminaria removed finds that her access to the clinic entrance is blocked or impeded . . ., the above-mentioned complications may result. 799 F. Supp. at 1427.[22]

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[22]*See also Planned Parenthood Association of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 620 (N.D. Cal. 1991) (women are often so upset by protestors that they reschedule appointments and obtain more later, and therefore more dangerous, medical procedures); *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1489 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part, vacated in part sub nom, Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) ("a 'rescue' (continued...)

In sum, without a federal means of restraining respondents and other antiabortion zealots who engage in criminal conduct, the violence against clinics and physicians who provide abortions will continue to take its toll on women's health.

III. RICO'S BROAD WORDING SQUARELY APPLIES TO ANY PERSON OR ENTITY THAT ENGAGES IN A "PATTERN OF RACKETEERING ACTIVITY," REGARDLESS OF ECONOMIC MOTIVATION.

A federal remedy against respondents' lawlessness is provided for by the terms of RICO, 18 U.S.C. § 1962(c), which forbids "any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ." As described above, much of the criminal activity engaged in by anti-choice extremists constitutes a pattern of racketeering activity.

This Court has repeatedly held that "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, . . . but also of its express admonition that RICO is to 'be liberally

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[22](...continued)
demonstration creates a substantial risk that a clinic's patients may suffer physical and mental harm"); *Cousins v. Terry*, 721 F. Supp. 426, 432 (N.D.N.Y. 1989) (testimony that women who gained entrance to the clinic were "traumatized by the ordeal" of having to be escorted through demonstrators shouting insulting epithets); *Roe v. Operation Rescue*, 710 F. Supp. 577, 582 (E.D. Pa. 1989) (woman denied necessary medical services in Pennsylvania as a result of blockade), *aff'd*, 919 F.2d 857 (3d Cir. 1990); *N.Y. State National Organization for Women v. Terry*, 704 F. Supp. 1247, 1260-61 n. 17, 1262 (S.D.N.Y.) (1989), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

construed to effectuate its remedial purposes.'"[23] *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985) (citations omitted); *see also Tafflin v. Levitt*, 110 S. Ct. 792, 799 (1990). "The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"[24] *Id.*, 473 U.S. at 499 (quoting *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606(1985)). *See also Russello*, 464 U.S. at 26 (RICO was "intended to provide new weapons of unprecedented scope"). The breadth of RICO, and the fact that by its plain terms it applies to the respondents' conduct at issue here, is the result of deliberate policy choices on the part of Congress.[25] Accordingly, the Court should construe RICO to the full extent

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[23]Section 904(a) of RICO, Pub.L. No. 91-452, 84 Stat. 947, see note following 18 U.S.C. § 1961, p. 438, directs that "[t]he provision of this Title shall be liberally construed to effectuate its remedial purposes." In *Russello v. United States*, 464 U.S. 16, 27 (1983), this Court noted that RICO is the only substantive federal criminal statute that contains such a directive.

[24]Furthermore, this Court has observed that

> the language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of [RICO]. Indeed, the very purpose . . . was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions.

United States v. Turkette, 452 U.S. 576, 586 (1981). These words are as applicable to clinic violence as to other types of organized crime.

[25]Indeed, on several occasions amendments to RICO were proposed that would have excluded criminal conduct that was not economically motivated, but none of those amendments were enacted. *See e.g.*, Senate Report 101-269, 101st Cong., 2d Sess. (April 24, 1990) at 12.

of its carefully chosen terms in order to reach the respondents' concerted national campaign of violence and threats against women and physicians.

IV. A FEDERAL REMEDY IS NECESSARY TO ENSURE THAT WOMEN ARE NOT PREVENTED FROM EXERCISING THEIR RIGHT TO CHOOSE ABORTION.

Absent a federal remedy, clinic violence and intimidation of physicians and clinic staff are unlikely to abate.[26] Testimony before several federal district courts demonstrates that state criminal laws and local law enforcement officials cannot control organized widespread clinic violence and harassment. Additionally, abortion opponents have interpreted this Court's decision in *Bray* as permission to engage in criminal behavior, and the inevitable result has been increased violent and threatening activity, which is also designed to paralyze local law enforcement.[27]

For example, a Kansas district court found that "Operation Rescue has purposefully acted to interfere with the ability of the local law enforcement authorities to protect the rights of the plaintiffs and their patients." *Women's Health Care Services v. Operation Rescue*, 773 F. Supp. 258, 265 (D. Kan. 1991). In addition, the district court in *Pro-Choice Network*,

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[26]Prior to *Bray*, many reproductive health providers, frustrated by the lack of remedies in state court, obtained injunctions and other relief in the federal courts. *See, e.g., Mahoney v. District of Columbia*, No. 89-3136-OG, 1990 U.S. Dist. LEXIS 69 (Jan 8, 1990); *McMonagle*, 868 F.2d 1342; *Terry*, 886 F.2d 1339 (2d Cir. 1989). Since *Bray*, however, the only other federal avenue of relief now available of which we are aware is the one at issue in this case.

[27]Indeed, the organized efforts of respondents include harassment and intimidation of local law enforcement officials and witnesses who testify against them. *Pro-Choice Network*, 799 F. Supp. at 1426-27.

found that "[l]ocal law enforcement has been unable to respond effectively to plaintiffs' complaints . . . Defendants participate in their "rescue" activities on a continual basis and the local police do not have the resources necessary to monitor the situation constantly." 799 F. Supp. at 1426.[28]

Testimony before Congress confirms the inability of state laws and local officials to combat the respondents' organized and sweeping attacks on abortion services and on women who seek abortion. It also demonstrates that some local law enforcement agencies are dangerously lax in their response to the violence. Willa Craig, Executive Director of the Blue Mountain Clinic, testified:

> We have sought, when necessary, the protection of Montana law, with minimal result. In one Montana

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[28]See also *Bray*, 113 S. Ct. at 781, 796 (Stevens, J., dissenting) (during "rescue" operations, "the duly constituted authorities are rendered ineffective and *mob violence prevails*") (emphasis added); *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039 (2d Cir. 1993) (demonstrators' unruly conduct required the intervention of approximately one-third of the town's police force); *National Organization for Women v. Operation Rescue*, 726 F. Supp. at 1489-90 & n.4 (limited police resources combined with lack of advance notice identifying a target clinic makes it difficult for local police to prevent protestors from forcing the closure of a facility); *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 379 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990) (about one-third of the police force was stationed at the clinic, therefore, had an emergency occurred elsewhere, police could not have responded promptly); *NOW v. Operation Rescue*, 726 F. Supp. 300, 303 (D.D.C. 1989) (even if police knew in advance which clinics would be targeted, they do not have enough personnel and resources to prevent protracted interruption of access); *Terry*, 704 F. Supp. at 1262 (inability of local police officers to ensure access to targeted clinics in the face of blockades makes injunctive relief necessary); *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361, 1363-64 (1990) (local police ineffective in preserving access to clinic).

> community local police refused to respond even to an office invasion. There is much evidence that this violent sector of the anti-choice movement is systematically organized and deployed, and that it's leaders are often known to the authorities. They advertise publicly for recruits and utilize the media to announce plans and reject warnings from city officials. They have been made bolder by the lack of substantive penalties and law enforcement resources in small towns. It is evident in Montana that the scope of this violence exceeds the ability of even a willing community to respond effectively.

1993 Senate Hearings, Craig Testimony at 4.[29]

It is thus quite clear that state laws and state law enforcement are inadequate to confront the nationally organized "mob violence"[30] that defines and characterizes respondents' conduct. This is precisely the type of circumstance -- where organized, interstate activity is impervious to local law enforcement -- that RICO was designed to address, and this Court should apply the law as broadly as it was both intended and written.

V. RICO REACHES ONLY CRIMINAL CONDUCT, NOT PROTECTED SPEECH.

Finally, it is clear that criminal conduct is not protected by the First Amendment and reversing the Seventh Circuit's

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[29] Mary Bannecker, Administrator of the Northeast Women's Center, testified, "[t]he police response in Philadelphia has . . . been inconsistent. On November 24, three people illegally entered the building . . ., and the police arrived and no arrests were made. Again, on November 30, seven people entered the clinic illegally. The police were called again and no arrests were made." 1985-86 Hearings at 6.

[30] *Bray*, 113 S. Ct. at 796 (Stevens, J., dissenting).

decision would not open the door to criminal prosecution of protected speech. Indeed, the Court of Appeals took care to note that petitioners' complaint is not based on constitutionally protected conduct, but rather "seeks relief from criminal and tortious activities such as trespass, clinic invasion, vandalism, extortion, and tortious interference with business relationships." 968 F.2d at 616.[31] Moreover, it is well-established that "[t]he First Amendment does not protect violence.[32]

Not only does respondents' conduct fall outside the scope of the First Amendment's protection, RICO, by its terms, focuses exclusively on conduct that is criminal. "Racketeering activity" is an essential element of a RICO offense, *see* 18 U.S.C. § 1962, thus any application of RICO to anti-choice protestors would address their conduct only insofar as it violates specified federal criminal laws, such as the arson and

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[31]In *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993), this Court carefully distinguished the Wisconsin ordinance at issue in that case, which was directed at "conduct unprotected by the First Amendment," *id.* at 2201, from the Minnesota ordinance at issue in *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2547 (1992), which was "explicitly directed at expression." *Mitchell*, 113 S. Ct. at 2201. So here, insofar as respondents' activities are criminal, the Court should recognize that they are not protected expression.

[32]"Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (quoting *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring). As this Court very recently affirmed, "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Mitchell*, 113 S. Ct. at 2199. *See also McMonagle*, 868 F.2d at 1349 (affirming liability under RICO of defendants who had entered clinic illegally because "[d]efendants' actions went beyond mere dissent and publication of their political views").

extortion engaged in by respondents here.[33]

In sum, so long as respondents obey the criminal laws they need not fear suit under RICO. But because respondents have dedicated themselves to lawlessness, this Court must permit the use of RICO to protect the lives and health of women who seek reproductive health care and the lives and health of clinic staff and physicians who seek to provide that care.

CONCLUSION

For the foregoing reasons, *amici curiae* urge that the judgment of the Court of Appeals be reversed.

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Respectfully submitted,

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[33]Similarly, in *United States v. Rowlee*, 899 F.2d 1275 (2d Cir. 1990), *cert. denied*, 498 U.S. 828 (1990), members of a political group that promotes the evasion of income taxes, were charged with violating 26 U.S.C. § 7602(2), which prohibits the willful assistance in preparation of a false or fraudulent tax return. The Court of Appeals for the Second Circuit, rejecting a First Amendment defense to the criminal convictions, held "[i]f the defendants did not violate [the statute], the restrictions imposed by that statute did not violate their First Amendment rights. If they did violate [the statute], they were not protected by the First Amendment." 899 F.2d at 1280; *see also United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986).